IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs October 7, 2008

STATE OF TENNESSEE v. DEDRICK L. PATTON

Appeal from the Criminal Court for Davidson County
No. 2006-A-423 Cheryl Blackburn, Judge

No. M2007-02492-CCA-R3-CD - Filed February 2, 2009

A Davidson County Criminal Court jury convicted the defendant, Dedrick L. Patton, of one count of possession with intent to sell .5 grams or more of cocaine and one count of simple possession of marijuana. The trial court imposed an effective sentence of 12 years' incarceration. In this appeal, the defendant contends that the trial court erred by denying his motion to suppress and that his sentence is excessive. Discerning no error, we affirm.

Tenn. R. App. P. 3; Judgments of the Criminal Court Affirmed

JAMES CURWOOD WITT, JR., J., delivered the opinion of the court, in which D. KELLY THOMAS, JR., and CAMILLE R. MCMULLEN, JJ., joined.

J. Michael Engle (at trial) and Jennifer Hall and Jeffrey A. DeVasher (on appeal), Assistant Public Defenders, for the appellant, Dedrick L. Patton.

Robert E. Cooper, Jr., Attorney General and Reporter; John Bledsoe, Assistant Attorney General; Victor S. Johnson III, District Attorney General; and Bret Gunn, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

I. Factual Background[1]

On June 7, 2005, Detective Justin Fox of the West Crime Suppression Unit of the Metropolitan Nashville-Davidson County ("Metro") Police Department went to an apartment located

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[1] Because a reviewing court may consider evidence from both the hearing on the motion to suppress and the trial, *see State v. Henning*, 975 S.W.2d 290, 299 (Tenn. 1998), (holding that " in evaluating the correctness of a trial court's ruling on a pretrial motion to suppress, appellate courts may consider the proof adduced both at the suppression hearing and at trial"), and because the evidence at the two proceedings largely overlapped, we have combined evidence from each proceeding to present a more cohesive factual summary.

at 2205 Lindell Avenue in Davidson County to investigate an anonymous complaint of possible drug activity. Accompanied by Detective Joseph Simonik, Detective William Stokes, and Detective Joseph Osbourne, Detective Fox "conducted a knock and talk at the location" at approximately 11:45 p.m. Detective Fox explained that he and Detective Simonik approached the front of the residence while the remaining detectives went to the rear of the residence. Detective Fox knocked on the door, and co-defendant Isaac Lytle opened the door. The detective testified at the suppression hearing that he recognized the co-defendant as the resident of the apartment because he had pulled the utility records for the residence and cross-referenced them with "mug" shots. Detective Fox testified that, upon the co-defendant's opening the door, he "noticed . . . a lot of smoke and a strong smell of marijuana coming from that location." He added, "When he had opened the door, I could see to the right. Right there where he was there was a table, and right there in plain view was a half[-]smoked marijuana cigarette and a box of plastic baggies on the table." Upon seeing the contraband, Detective Fox "stepped inside the location to secure Mr. Lytle and . . . . observed two individuals sitting on th[e] couch," one of whom was the defendant. As he stepped inside, he saw the defendant "drop a plastic - - it looked like a plastic bag containing something. . . . to the right of the couch."

After Detective Fox secured the co-defendant, the other officers commenced a "protective sweep" of the apartment to discern whether anyone else was there. During that sweep, Detective Osbourne found a "plastic bag containing four separate . . . baggies of white powder substance, which field tested positive for cocaine base" in the area where the defendant had made a "dropping/throwing motion." Other officers discovered two sets of digital scales in plain view during the protective sweep of the apartment. Following the discovery of the cocaine and scales, Detective Fox asked for and received consent from the co-defendant to perform a more thorough search of the residence. The defendant was placed under arrest, and during the search of his person following that arrest, officers found $195 in cash.

Co-defendant Isaac Lytle testified at trial that he was the only resident of 2205 Lyndell Avenue, Apartment B and that the defendant was an acquaintance. He stated that he had been "hanging out" and "get[ting] high" with the defendant, whom he knew only as "Cheese," every other day for nearly a year. He testified that the defendant did not spend nights at the residence and that he had only permitted the defendant to remain in the residence alone during the day on a single occasion.

II. Motion to Suppress

Prior to trial, the defendant filed a motion to suppress the evidence seized from the apartment, claiming that "the police search of his person and the area immediately surrounding him" violated "Tenn. R. Crim. P. 41(f), Section 7 of the Tennessee Declaration of Rights, and the Fourth Amendment to the United States Constitution." At the hearing on the motion, defense counsel conceded that the defendant lacked standing to challenge the search of the apartment, noting that "the motion in the first sentence was careful to delineate [that] . . . . [w]e are not objecting to the search of the apartment itself but to the search of [the defendant] and the area . . . under . . . his control at the point of police entry."

Following a hearing featuring only the testimony of Detective Fox, the trial court denied the motion to suppress, finding, "Although defendant Patton only claimed standing to the immediate area around him, the Court finds that there is no legal basis to raise a claim. . . . He had discarded the bag and therefore did not have a privacy expectation." The trial court also found that the "knock and talk" conducted in this case did not exceed the requirements of *State v. Cothran*, 115 S.W.3d 513 (Tenn. Crim. App. 2003). The trial court specifically concluded that "the evening hour" did not invalidate the knock and talk because "the lights were on at the residence, indicating that a person or persons were awake inside the apartment" and because "the *Cothran* case . . . does not provide a time limitation."

In this appeal, the defendant, despite his concession in the trial court, asserts that he had standing to challenge the search of the co-defendant's apartment and contends that a de novo review of the issue of standing is in order. He also contends, however, that this court need not reach the issue of his standing to challenge the search "because the unlawful encounter originated prior to the officers' entrance into the home." He argues that the warrantless search of the co-defendant's apartment violated fourth amendment principles because the "knock and talk" that precipitated the search was "outside the confines of a lawful 'knock and talk.'"

A trial court's factual findings on a motion to suppress are conclusive on appeal unless the evidence preponderates against them. *State v. Binette*, 33 S.W.3d 215, 217 (Tenn. 2000); *State v. Odom*, 928 S.W.2d 18, 23 (Tenn. 1996). Thus, questions of credibility, the weight and value of the evidence, and the resolution of conflicting evidence are matters entrusted to the trial judge, and this court must uphold a trial court's findings of fact unless the evidence in the record preponderates against them. *Odom*, 928 S.W.2d at 23; *see also* Tenn. R. App. P. 13(d). The application of the law to the facts, however, is reviewed de novo on appeal. *State v. Keith*, 978 S.W.2d 861, 864 (Tenn. 1998). We review the issue in the present appeal with these standards in mind.

A. Standing

The determination of "standing," as that term is used herein, does not rely on an inquiry separate or distinct from the determination of whether the defendant's Fourth Amendment rights were violated by the law enforcement action. *See Rakas v. Illinois*, 439 U.S. 128, 140, 99 S. Ct. 421, 429 (1978). Indeed, the relevant inquiry in all Fourth Amendment challenges is "whether the disputed search and seizure has infringed an interest of the defendant which the Fourth Amendment was designed to protect," *id.*, 99 S. Ct. at 429, and this inquiry turns "not upon a property right in the invaded place but upon whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place," *id.* at 143, 99 S. Ct. at 430. To mount a successful Fourth Amendment challenge, a defendant must first show "that he personally has an expectation of privacy in the place searched, and that his expectation is reasonable; i.e., one that has 'a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society.'" *Minnesota v. Carter*, 525 U.S. 83, 88, 119 S. Ct. 469, 472 (1998) (quoting *Rakas*, 439 U.S. at 143-

44, 99 S. Ct. at 430 n.12); *see also State v. Ross*, 49 S.W.3d 833, 840 (Tenn. 2001) (citations omitted) ("[W]hen evaluating whether a particular defendant's Fourth Amendment rights have been violated, we look to two inquiries: (1) whether the individual, by his conduct, has 'exhibited an actual (subjective) expectation of privacy,' and (2) whether the individual's subjective expectation of privacy is 'one that society is prepared to recognize as reasonable[.]'").

The defendant asserts that his possessory interest in the cocaine seized, the fact that he had spent time alone in the co-defendant's apartment on a single occasion, and his conduct in "smoking marijuana inside instead of out of doors, keeping the apartment door closed instead of leaving it ajar, and closing the shades" should lead this court to conclude that he had a legitimate expectation of privacy in the co-defendant's apartment. We need not reach a conclusion on this issue, however, because of the defendant's concession in the trial court.

In his motion, the defendant took pains to make clear that he did not intend to challenge the search of the apartment but only the search of "his person and the area immediately around him." Later, at the hearing on his motion, the defendant again insisted that his challenge did not extend to the search of the apartment and conceded to the State's assertion that he lacked standing on the issue. Although the defendant correctly asserts that the determination of standing is a question of law that this court reviews de novo, *see, e.g.*, *State v. James A. Jackson*, No. M1998-00035-CCA-R3-CD, slip op. at 7 (Tenn. Crim. App., Nashville, May 5, 2000), our de novo review does not afford the defendant the luxury of taking a position on appeal specifically abandoned at trial, *see State v. Adkisson*, 899 S.W.2d 626, 634-35 (Tenn. Crim. App. 1994); *see also State v. Leach*, 148 S.W.3d 42, 55 (Tenn. 2004); *Johnson v. State*, 38 S.W.3d 52, 60 n.8 (Tenn. 2001); *State v. Aucoin*, 756 S.W.2d 705, 715 (Tenn. Crim. App. 1988) (holding that a party cannot object on one ground at trial and assert new basis on appeal); *State v. Matthews*, 805 S.W.2d 776, 781 (Tenn. Crim. App. 1990); *State v. Dobbins*, 754 S.W.2d 637, 641 (Tenn. Crim. App. 1988); *State v. Brock*, 678 S.W.2d 486, 490 (Tenn. Crim. App. 1984). Because the defendant conceded in the trial court that he lacked standing to challenge the search of the apartment, we decline his invitation to revisit the issue on appeal.

B. "Knock and Talk" and Search of Defendant's Person

The defendant challenges the "knock and talk" as this initial encounter led to the later search of his person. Although the defendant also claims a violation of his reasonable expectation of privacy regarding the area immediately around him, he has failed to cite any authority for the proposition that "the area immediately surrounding" an individual is a separate sphere entitled to Fourth Amendment protection. *See* Tenn. Ct. Crim. App. R. 10(b) ("Issues which are not supported by argument, citation to authorities, or appropriate references to the record will be treated as waived in this court."). The defendant's failure to cite authority in support of this proposition can be largely

attributed to the fact that no such authority exists.[2] Given the defendant's concession of standing to challenge the search of the apartment and the lack of Fourth Amendment protection afforded to "the area immediately surrounding" the defendant, the focus of our inquiry is on the search of the defendant's person.

Although the defendant may have lacked standing to challenge the search of the co-defendant's apartment, our inquiry into the search of the defendant's person must necessarily begin with the "knock and talk" conducted at the residence of the co-defendant. *See State v. Triston Lee Harris*, M2006-01532-CCA-R3-CD (Tenn. Crim. App., Nashville, Feb. 6, 2008) ("We typically analyze searches and seizures . . . by starting with the initial police-citizen encounter and progressing through the chronological sequence of events.").

Both the state and federal constitutions offer protection from unreasonable searches and seizures; the general rule is that a warrantless search or seizure is presumed unreasonable and any evidence discovered subject to suppression. *See* U.S. Const. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ."); Tenn. Const. art. I, § 7 ("That the people shall be secure in their persons, houses, papers and possessions, from unreasonable searches and seizures . . . ."). "[T]he most basic constitutional rule in this area is that 'searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment -- subject only to a few specifically established and well-delineated exceptions.'" *Coolidge v. New Hampshire*, 403 U.S. 443, 454-55, 91 S. Ct. 2022, 2032 (1971) (quoting *Katz v. United States*, 389 U.S. 347, 357, 88 S. Ct. 507, 514 (1967)); *see also State v. Bridges*, 963 S.W.2d 487, 490 (Tenn. 1997). Thus, a trial court necessarily indulges the presumption that a warrantless search or seizure is unreasonable, and the burden is on the State to demonstrate that one of the exceptions to the warrant requirement applied at the time of the search or seizure.

The phrase "knock and talk" appears to have first arrived in the vernacular of this court in *State v. Cothran*, 115 S.W.3d 513 (Tenn. Crim. App. 2003), wherein we recognized that "[a]lthough our state's courts have not yet addressed the 'knock and talk' procedure, federal courts and courts of other states have recognized it as an accepted investigative tactic" and that "courts have upheld the 'knock and talk' procedure as a consensual encounter, as well as a means to request consent to search a residence." *Id.* at 521 (citing *United States v. Jones*, 239 F.3d 716, 720 (5th Cir. 2001), *cert. denied*, 534 U.S. 861, 122 S. Ct. 142 (2001); *Keenom v. State*, 80 S.W.3d 743, 746 (Ark. 2002); *Latta v. State*, 88 S.W.3d 833, 838 (Ark. 2002); *State v. Smith*, 488 S.E.2d 210, 214 (N.C.

[2] As best as we can surmise, the defendant appears to be borrowing a phrase from the concept of a search following a lawful arrest, which permits a search of the arrestee as well as the area within the arrestee's immediate control. *See generally Chimel v. California*, 395 U.S. 752, 762-63, 89 S. Ct. 2034, 2040 (1969); *State v. Crutcher*, 989 S.W.2d 295, 300-01 (Tenn. 1999). It is not entirely clear from the record whether the search of the defendant's person was conducted before or after his arrest for possession of cocaine and marijuana. As will be discussed later, however, the distinction is of no consequence because no contested evidence was seized during the search of the defendant's person following the discovery of the contraband.

1997)). Because a "knock and talk" is a consensual police-citizen encounter, it is not necessary that the State show that the officer had reasonable suspicion prior to the initiation of such a procedure.

Here, the officers approached the co-defendant's residence for the purpose of speaking with him about an anonymous complaint of drug activity. Detective Fox knocked on the door and the co-defendant, the only resident of the apartment, voluntarily answered the door. The officer's conduct in simply knocking on the door does not implicate Fourth Amendment concerns. *See United States v. Thomas*, 430 F.3d 274, 277 (6th Cir. 2005) ("Consensual encounters do not lose their propriety, moreover, merely because they take place at the entrance of a citizen's home."). Neither the time of day nor the fact that the officers were not in uniform alters the consensual nature of the contact in this instance. *Cf. United States v. Munoz*, 150 F. Supp. 2d 1125, 1133 (D. Kan. 2001) (citing multiple sources and recognizing that "coercive circumstances such as unreasonable persistence by the officers[,] . . . . a display of weapons, physical intimidation or threats by the police, multiple police officers questioning the individual, or an unusual place or time for questioning may transform a consensual encounter between a citizen and a police officer into a seizure").

Once the co-defendant opened the door, Detective Fox saw in plain view marijuana and other evidence of illegal drug use. In addition, he observed the defendant drop a plastic bag onto the floor next to the couch where he was seated. Once the defendant abandoned the plastic bag, he lost any reasonable expectation of privacy in its contents. *See State v. Ross*, 49 S.W.3d 833, 842 (Tenn. 2001). The record established that Detective Osbourne retrieved the plastic bag either during the protective sweep or the consensual search of the apartment, but it does not matter which because the defendant conceded in the trial court a lack of standing to challenge either. The discovery of the contraband provided the officers with probable cause to arrest the defendant and co-defendant, and the arrest of the defendant permitted the officers to search the person of the defendant and the area immediately around him. *See generally Chimel v. California*, 395 U.S. 752, 762-63, 89 S. Ct. 2034, 2040 (1969); *State v. Crutcher*, 989 S.W.2d 295, 300-01 (Tenn. 1999). During the lawful search incident to the defendant's arrest, officers discovered $195 in cash.[3] Under these circumstances, the trial court did not err by denying the defendant's motion to suppress the cocaine and marijuana.

II. Sentencing

The defendant contends that his sentence is excessive, specifically complaining that the trial court failed to find in mitigation that he had attempted to further his education and failed to attribute appropriate weight to the single mitigating factor it did find applicable. The State submits that the sentence is appropriate.

When a defendant challenges the length of a sentence, this court generally conducts a de novo review of the record with a presumption that the determinations made by the trial court are correct. T.C.A. § 40-35-401(d) (2003). This presumption, however, is conditioned upon the

[3] The defendant does not challenge the seizure of the money.

affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances. *State v. Ashby*, 823 S.W.2d 166, 169 (Tenn. 1991). The burden of showing that the sentence is improper is upon the appellant. *Id*. If the review reflects the trial court properly considered all relevant factors and its findings of fact are adequately supported by the record, this court must affirm the sentence, "even if we would have preferred a different result." *State v. Fletcher*, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991). In the event the record fails to demonstrate the required consideration by the trial court, appellate review of the sentence is purely de novo. *Ashby*, 823 S.W.2d at 169.

In making its sentencing determination in the present case, the trial court, at the conclusion of the sentencing hearing, was obliged to determine the propriety of sentencing alternatives by considering (1) the evidence, if any, received at the trial and sentencing hearings, (2) the presentence report, (3) the principles of sentencing and arguments as to sentencing alternatives, (4) the nature and characteristics of the criminal conduct involved, (5) evidence and information offered by the parties on the enhancement and mitigating factors, (6) any statements the defendant made in his behalf about sentencing, and (7) the potential for rehabilitation or treatment. T.C.A. §§ 40-35-210(a), (b); -103(5); *State v. Holland*, 860 S.W.2d 53, 60 (Tenn. Crim. App. 1993).

The defendant complains that the trial court erred by failing to consider under the "catch-all" mitigating factor that he was a full-time student at the time of the crimes. *See* T.C.A. § 40-35-113(13) (2006). We fail to see how the defendant's participation in an educational program mitigated his conduct in this case. *See State v. Sarah Michelle Vinson*, No. M2007-02346-CCA-R3-CD (Tenn. Crim. App., Nashville, Aug. 1, 2008).

As to the defendant's claim that the trial court failed to attribute sufficient weight to its finding that the defendant's conduct neither caused nor threatened serious bodily injury, *see* T.C.A. § 40-35-113(11), the 2005 amendments to the Sentencing Act removed the statutory provision that permitted a defendant to contest the weight attributed to the enhancement and mitigating factors. Prior to the 2005 amendment, Tennessee Code Annotated section 40-35-401 allowed an appeal on grounds that "[t]he enhancement and mitigating factors were not weighed properly, and the sentence is excessive under the sentencing considerations set out in § 40-35-103." T.C.A. § 40-35-401(b)(2) (2003). The 2005 amendment removed this provision. In addition, the 2005 amendment to Tennessee Code Annotated section 40-35-114 provides that the trial court "shall consider, but is not bound by" the enhancement factors, rendering them advisory in nature. Given these statutory provisions, this court is not free to consider on appeal the defendant's claim that the mitigating factor was not weighed properly.

III. Conclusion

Because the police conduct resulting in the seizure of the marijuana and cocaine did not violate Fourth Amendment principles, the trial court did not err by denying the defendant's motion to suppress these items. Our de novo review of the sentence establishes that the sentence given is appropriate. Accordingly, the judgments of the trial court are affirmed.

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JAMES CURWOOD WITT, JR., JUDGE